UTAMA MERCHANT BANK BHD

v.

DATO' MOHD NADZMI MOHD SALLEH

HIGH COURT MALAYA, KUALA LUMPUR
RAMLY ALI JC
[SUIT NO: D9-22-1249-2000]
22 DECEMBER 2000

CIVIL PROCEDURE: *Affidavits - Defective affidavit - Absence of title in jurat - Rules of the High Court 1980, Form 78 - Whether a serious defect - Whether plaintiff entitled to rely on O. 41 r. 4 to allow use of defective affidavit*

CIVIL PROCEDURE: *Affidavits - Jurat in Form 78(a) - Incomplete - Words "Through the interpretation of …" in Form 78(a) left blank because deponent conversant with language concerned - Whether words to be completed with "interpretation not required" in brackets - Rules of the High Court 1980, O. 41 r. 1(7)*

CIVIL PROCEDURE: *Affidavits - Jurat - Form 78 - Variations in form - Whether circumstances of case required variations made - Rules of the High Court 1980, O. 1 r. 7*

CIVIL PROCEDURE: *Affidavits - Defective affidavits - Discretionary power of court to allow use of defective affidavits - In what circumstances - Rules of the High Court 1980, O. 2 r. 1 and O. 41 r. 4*

CIVIL PROCEDURE: *Affidavits - Defective affidavits - No endorsement in relation to dates of swearing and filing of affidavits - Failure to apply for leave of court to use affidavits - Whether non-compliance of O. 41 r. 9(2) Rules of the High Court 1980*

The plaintiff applied for summary judgment against the defendant by way of a summons-in-chambers and supported by two affidavits ('the affidavits'). The defendant raised a preliminary objection ('PO') that the jurats contained in the affidavits were not as prescribed in Form 78 of the Rules of the High Court 1980 ('RHC') and therefore the affidavits failed to comply with O. 41 rr. 1(7) and 1(8) RHC. The senior assistant registrar ('SAR') upheld the PO and rejected the affidavits. Accordingly, the plaintiff's application for summary judgment was dismissed for want of supporting affidavit. Hence, this appeal by the plaintiff.

The issues were: (1) whether the absence of title in the jurat to one of the affidavits was a serious defect; (2) whether the words "Through the interpretation of …" in the jurat to both affidavits which were left blank because the deponent was conversant with the language concerned should have been completed irrespective thereof; (3) whether the variations in the format from the actual words used in Form 78(a) was acceptable by virtue of O. 1 r. 7 RHC; (4) whether the plaintiff's oral application to allow the use of the defective affidavits should be allowed under O. 41 r. 4 RHC on its allegation that it had short notice of the PO; (5) whether the plaintiff could rely on s. 19 Part H of the Rulings of the Bar Council 1997 on "Notice of Preliminary Objections"; and (6) whether the court had the inherent power under O. 2 r. 1 RHC to cure the said irregularities.

Held:

[1] The phrase "the jurat must be completed" in O. 41 r. 1(7) RHC is very significant to the present case. It is a mandatory requirement that the jurat as in Form 78 RHC must be completed. The word "must" indicates its mandatory nature. The word "complete" means "having all the necessary and appropriate parts" as defined in the *Concise Oxford Dictionary* tenth edition.

[2] A jurat is a certificate by itself and therefore needs to be entitled as in the action. The title of the action must form part of the jurat as provided in Form 78. The only place in O. 41 RHC which makes reference to Form 78 is r. 1(8) and the "Title as in action" stated at the top of Form 78 must refer and be a part of the jurat.

[3] As regards the words "Through the interpretation of …" in Form 78(a), even though the deponent was conversant in Bahasa Malaysia and was not blind or illiterate, it must be completed accordingly, *ie*, by inserting in the blank spaces within brackets the words "(interpretation not required)". To leave it blank meant that the jurat was not properly completed and thus did not comply with O. 41 r. 1(7) and (8) RHC. Further, only when there was some element of proof either in the affidavit itself or in the jurat to show that such interpretation was not required, could the court safely assume that the deponent was conversant in Bahasa Malaysia.

[4] Apart from the above, the affidavits did not contain any endorsement relating to the dates of swearing and filing of them contrary to O. 41 r. 9(2) RHC. Further, the plaintiff failed to apply for leave of court to use them as required by the said rule.

[5] The word "shall" in O. 1 r. 7 RHC indicates the mandatory nature of the requirement that variations in the forms in Appendix A to the RHC can only be accepted if the circumstances of the case require. Here, there was neither evidence nor proof to show that the circumstances of the case required the plaintiff to vary Form 78 in the affidavits. There was no justification why the affidavits could not comply with O. 41 r. 1(7) and (8) RHC. Therefore, O. 1 r. 7 RHC was not applicable.

[6] The circular issued by the Chief Registrar of the Federal Court dated 22 May 1999 also emphasised strict compliance with O. 41 RHC.

[7] The circumstances showed that the plaintiff had sufficient time to file a formal application for leave of court to allow the use of the defective affidavits under O. 41 r. 4 RHC. But the plaintiff chose not to do anything until the SAR gave his decision. The court was of the view that the plaintiff's failure to make a formal application for leave under O. 41 r. 4 RHC was not because of no opportunity or insufficient time but because of the plaintiff's own stand that it had complied with O. 41 r. 1(7) and (8) RHC and hence no question of making any application for leave, oral or otherwise would arise.

[8] The plaintiff could not rely on s. 19 Part H of the Rulings of the Bar Council 1997 on "Notice of Preliminary Objections" because: (i) the said Rulings do not affect the discretion of the court which is exercised based on the existing provisions of laws and relevant rules; and (ii) the notice of PO given 10 days before the hearing was good and sufficient notice based on decided cases; and (iii) if the said notice was not sufficient notice, the plaintiff should have applied for an adjournment for the PO under s. 19(c) of the said Rulings, which it did not do.

[9] The plaintiff misconstrued O. 41 r. 4 RHC as giving it a carte blanche cover to overlook all forms of irregularities, without appreciating the fact that O. 41 r. 4 gives the discretion to the court to allow or disallow a party to use a defective affidavit. Hence, the plaintiff's entitlement was subject to the court's discretion and unless the discretion was wrongly exercised, the decision of the SAR should not be disturbed.

[10] It is a general rule that all rules and forms under the RHC must be complied with for the purpose of uniformity and certainty. The powers under O. 2 r. 1 and O. 41 r. 4 are exceptions to the general rule. There must be strong justification why litigants cannot comply with those general rules in order for the court to exercise such powers. A mere omission or oversight on the part of litigants should not be an excuse to invoke those powers. Otherwise the "exception" will become the rule and the purpose of drafting all those rules will be defeated.

[11] An affidavit may not be excepted if the irregularity is so serious despite the fact that it may not prejudice the other party. In the present case, although the defendant was not prejudiced by the affidavits, the defects in the affidavits were so serious that they could not be cured under O. 2 r. 1 RHC.

[Appeal dismissed.]

Case(s) referred to:

Bathamani Suppiah v. Southern Finance Co Bhd [2000] 2 CLJ 650 ***(dist)***
Capital Insurance Bhd v. Kasim Mohd Ali [2000] 1 CLJ 269 ***(foll)***
Dato' Wong Gek Meng v. Pathmanathan Mylvaganam [1998] 1 CLJ 625 ***(foll)***
Datuk Bandar Kuala Lumpur v. Seman Amat & Other Cases [1996] 3 CLJ 263 ***(refd)***
Dr Woo Kin Chong v. Mary Ou Holdings Sdn Bhd [1997] 5 CLJ 164 ***(refd)***
Dynacast (S) Pte Ltd v. Lim Meng Siang & Ors [1989] 2 CLJ 1116 ***(foll)***
Fung Yuk Lien v. Foong Chee Sam (as administrator of the Estate of Kong Muk Tei (deceased)) [2000] 6 CLJ 411 ***(refd)***
Gan Hay Chong v. Siow Kian Yuh & Anor [1975] 1 MLJ 41 ***(foll)***
Gurbachan Singh v. Seagrott & Campbell (No 2) [1962] 28 MLJ 370 ***(refd)***
Han Euu Tiam v. Phang Kui Fatt & Ors [1999] 4 CLJ 395 ***(foll)***
Jasabena Sdn Bhd v. Beh Heng Poo & Anor [1985] 1 MLJ 394 ***(refd)***
Kuah Kok Kim v. Chong Lee Leong Seng Co (Pte) Ltd [1991] 1 SLR 122 ***(foll)***
Leal v. Dunlop Bio-Process International Ltd [1984] 1 WLR 874 ***(foll)***
Mohd Nazir Badar Shair v. Timbalan Menteri Dalam Negeri [2000] 2 CLJ 805 ***(refd)***
Ooi Chew Seng v. Utratech Sdn Bhd [1997] 5 CLJ 421 ***(refd)***
Perbadanan Nasional Insurans Sdn Bhd v. Pua Lai Ong [1996] 3 CLJ 321 ***(refd)***
Ratnam v. Cumarasamy & Anor [1965] 31 MLJ 228 ***(foll)***
Re Liow Fong Moi ex p Malayan Banking Bhd [2000] 6 CLJ 63 ***(dist)***
TR Hamzah & Yeong Sdn Bhd v. Lazar Sdn Bhd [1985] 2 MLJ 45 ***(refd)***
Yu Oi Young & Anor v. Ho Toong Peng & Ors [1977] 1 MLJ 120 ***(foll)***

Legislation referred to:

Bankruptcy Act 1967, s. 131
Rules of the High Court 1980, O. 1 r. 7, O. 2 r. 1, O. 14 r. 1, O. 41 rr. 1(7), (8), 4, 9(2)

Other source(s) referred to:

Bar Council Infoline, May-June 1999
Concise Oxford Dictionary, 10th edn
Jowitt's Dictionary of English Law, 1977 edn
Malaysian Court Practice (Malayan Law Journal Sdn Bhd), 1997, vol 1, p 2515
Rulings of the Bar Council 1997, Pt H, s. 19

For the plaintiff - J Pillai (Shamsulaili Shamsudin with him); M/s Kadir Tan & Ramli
For the defendant - Yusof Khan (TF Kong with him); M/s Yusof Khan & Fong

Reported by Usha Thiagarajah

JUDGMENT

Ramly Ali JC:

This is an appeal by the plaintiff to the judge-in-chambers againsts the decision of the learned senior assistant registrar (SAR) of the High Court made on 6 October 2000 for allowing the defendant's preliminary objection made under O. 41 r. 1(7) and (8) of the Rules of the High Court (RHC) 1980, in relation to the affidavits sworn by Stephanie Chiam Siew Peng dated 7 August 2000 and 27 September 2000 for the purpose of supporting the plaintiff's application for summary judgment under O. 14 RHC. The learned SAR had rejected both the affidavits on the grounds that the said affidavits failed to comply with requirements of O. 41 r. 1(7) and (8) RHC. Consequently the plaintiff's summon-in-chambers (encl. 3) for the said application for summary judgment was set aside for want of supporting affidavit.

Brief Facts

On 7 July 2000 the plaintiff filed a writ of summons and statement of claim against the defendant for the repayment of RM14,626,518.53 as money owed by the defendant under a term loan facility agreement dated 2 June 1997. On 31 July 2000 the defendant filed a memorandum of appearance. Later on 8 August 2000 the plaintiff applied for summary judgment under O. 14 RHC. The application was made by way of a summon-in-chambers (SIC) (encl. 3) and supported by two affidavits sworn by one Stephanie Chiam Siew Peng on 7 August 2000 (encl. 3A) and on 27 September 2000 (encl. 11). Both the affidavits are in Bahasa Malaysia. Before the said application was heard, the counsel for the defendant raised a preliminary objection on the ground that both the affidavits in question had not complied with the requirements under O. 41 r. 1(7) and (8) RHC. The defendant argued that the jurats contained in the said affidavits were not as prescribed in Form 78 and therefore the affidavits were invalid and as a result thereof, the plaintiff's application for summary judgment was left without supporting affidavit and accordingly should be dismissed with costs.

On 6 October 2000 the learned SAR upheld the defendant's preliminary objection and disregarded the plaintiff's affidavits and consequently dismissed the plaintiff's application for summary judgment.

Plaintiff's Submission

The plaintiff's contentions as apparent from it's solicitors submission are that:

i) The jurat in the plaintiff's affidavits are in compliance with Form 78(a) RHC, since the deponent, Stephanie Chiam Siew Peng, is conversant with Bahasa Malaysia. The words "through the interpretation of' are only necessary where the deponent does not understand Bahasa Malaysia;

ii) An oral application to allow the use of defective affidavits under O. 41 r. 4 RHC should be sufficient in view of the fact that there was no opportunity for the plaintiff to make a proper formal application to invoke the said order because of a very short notice at which the defendant's notice of preliminary objection was given;

iii) Absence of title to a jurat, even if required, is not a serious defect. Plaintiff is entitled to rely on O. 41 r. 4, RHC despite the irregularity;

iv) The defect in forms may be disregarded. The court has power under O. 2 r. 1, RHC, to cure any irregularity especially if the opposite party is not prejudiced as in the defendant's case.

Based on the reasons above stated, the plaintiff contended that the affidavits of the plaintiff's deponent ought to be admitted as evidence to support the plaintiff's application for summary judgment and prayed for the appeal to be allowed with cost and the learned SAR's order "dismissing the plaintiffs application for summary judgment" be reversed.

Defendant's Submission

The defendant relied on O. 41 r. 1(7) and (8) RHC and the decision in *Han Euu Tiam v. Phang Kui Fatt & Ors* [1999] 4 CLJ 395 to support his preliminary objection. The defendant's contention is that the jurat ought to have been in Form 78(a) RHC and should contain title as in the action. The want of title in the jurat was not the sole ground relied upon by the defendant to contend the plaintiff's non-compliance of O. 41 r. 1(7) & (8) RHC. An examination or scrutiny of the affidavit of Stephanie Chiam dated 7 August 2000 (at p. 5) shows that the wording adopted by the plaintiff in the format is contrary to Form 78(a) or (b) or (c), apart from no entitlement preceding the jurat. As for the affidavit dated 27 September 2000, similar divergence in the wording is present eventhough the jurat bears the title of the action. In fact, according to the defendant, the plaintiff had chosen to deviate from the Form as provided under the rules. Thus the defendant prays that the plaintiff's appeal as per encl. 12 be dismissed with cost.

Findings Of The Court

This appeal is against the decision of the learned SAR. Hence the plaintiff/appellant must necessarily show that the learned SAR had acted on a wrong principle when he exercised his discretion not to allow the plaintiff to use those affidavits which the learned SAR considered to be defective or that the decision not to exercise the discretion in the circumstances was wrong in law. The learned SAR's decision to dismiss the plaintiff's application for summary judgment was the necessary sequel to his finding that the affidavits were defective after his decision not to allow their use and not to allow a so-called "oral application" to be made under O. 41 r. 4, RHC.

The issue before this court in this appeal, though it takes effect as a rehearing, is whether or not the learned SAR was wrong in law in exercising his discretion, to disallow the plaintiff to use the affidavits which he found to be defective for want of compliance with O. 41 r. 1(7) and (8) RHC and/or that the learned SAR had acted on wrong principles of law when he disallowed the plaintiff from using the defective affidavits.

The relevant part of the said affidavit dated 7 August 2000 is as follows:

Diikrarkan oleh Stephanie)
Chiam Siew Peng di Kuala) signed
Lumpur pada 7.8.2000)

Di hadapan saya

Signed

...
Pesuruhjaya Sumpah

Affidavit ini difailkan oleh Tetuan Kadir, Tan & Ramli, Peguamcara bagi Plaintiff yang dinamakan di atas yang beralamat penyampaian di Tingkat 8, Menara Safuan, 80, Jalan Ampang, 50450 Kuala Lumpur.

While the relevant part of the said affidavit dated 27 September 2000 is as follows:

JURAT
DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR
(BAHAGIAN DAGANG)
GUAMAN NO: D9-22-1249-2000

ANTARA

UTAMA MERCHANT BANK BERHAD
(COMPANY NO: 23878 X) ... PLAINTIF

DAN

DATO MOHD. NADZMI BIN MOHD. SALLEH ... DEFENDAN

Diikrarkan oleh Stephanie)
Chiam Siew Peng di Kuala) signed
Lumpur pada 27 September 2000)

Di hadapan saya

Signed

...
Pesuruhjaya Sumpah

Affidavit ini difailkan oleh Tetuan Kadir, Tan & Ramli, Peguamcara kepada Plaintiff yang beralamat penyampaian di Tingkat 8, Menara Safuan, 80, Jalan Ampang, 50450 Kuala Lumpur.

Order 41 rr. 1(7) and (8) RHC reads as follows:

> Order 41 Rule 1(7) – Every affidavit must be signed by the deponent and the jurat must be completed and signed by the person before whom it is sworn.
>
> Order 41 Rule 1(8) – A jurat must be in one of the forms in Form 78.

The relevant form of jurat, that relates to one deponent, who is not an illiterate or blind person, is provided in Form 78(a), and reproduced hereunder:

> No. 78
> FORMS OF JURAT (O. 41 r. 1)
> (Title as in action)
>
> (a) To an affidavit by one deponent
>
> .....
>
> Sworn (or affirmed) on the ... day of ..., 19...,
> at (through the interpretation of .....)
>
> Before me,
>
> ...
>
> Commissioner for Oaths

The word "jurat" is not defined either in the RHC or in the Courts of Judicature Act 1964. Nor is the word defined in the Interpretation Acts 1948 and 1967. In *Jowitt's Dictionary of English Law* (1977 edn), 'jurat' is defined as:

> the statement at the foot of an affidavit of the names of the parties swearing it, and of the officer before whom it is sworn, of the date, and of any other necessary particulars, as the affidavit of an illiterate or blind person as read in the presence of an officer to such person and that he seemed perfectly to understand it.

In *Malaysian Court Practice (Malayan Law Journal Sdn Bhd (1997)*, High Court vol. 1, at p. 2515, 'jurat' is explained as follows:

> A jurat means a certificate of the administering officer or a person before whom the affidavit was sworn. It refers to the Clause written at the foot of the affidavit, stating when, where, and before whom such affidavit was sworn. A jurat must be in one of the forms in Form 78. Every affidavit must be signed by the deponent and **the jurat must completed** and signed by the person before whom it is sworn.

The phrase "the jurat must be completed" as found in O. 41 r. 1(7) RHC is very significant to the present case. It is a mandatory requirement that the jurat as in Form 78 must be completed. The word "must" as used in the rule indicates its mandatory nature. The word "complete" on the other hand, taken in its ordinary usage, means "having all the necessary and appropriate parts" (as defined in the *Concise Oxford Dictionary*, 10th edn). Siti Norma Yaakob JCA, in the case of *Perbadanan Nasional Insurans Sdn Bhd v. Pua Lai Ong* [1996] 3 CLJ 321 had said that:

> The word "must" as opposed to "may" is used in the rule, and we interpret that to mean as implying a peremptory mandate as opposed to a mere direction or discretion as the word "may" implies. We equate the meaning of the word "must" as that given to the word "shall", and for that reason the choice of the word "must" in the rule does not create the existence of any discretion or empowers the court to exercise any discretion.

I have also observed that the word "must" as used in O. 41 r. 1(7) and (8) RHC had been ruled to indicate its mandatory nature in the following cases: *Han Euu Tiam v. Phang Kui Fatt* [1999] 4 CLJ 395; *Mohd. Nazir bin Bader Shair v. Timbalan Menteri Dalam Negeri* [2000] 2 CLJ 805; and *Fung Yuk Lien v. Foong Chee Sam (as administrator of the Estate of Kong Muk Tei (deceased))* [2000] 6 CLJ 411.

In this respect, I fully agree with Mohd. Hishamudin J, in *Han Euu Tiam v. Phang Kui Fatt (supra)* when he said:

> In my judgment, there is merit in this preliminary objection. Clearly, there has not been compliance with O. 41 r. 1(7) and (8) and Form 78. First, there is no title in the jurat used in all the four affidavits. A jurat is a certificate and it is clear from Form 78, by the presence of the words:
>
> (Title as in action)
>
> appearing at the top part of the Form, that the title of the action must be stated at the top part of the certificate.
>
> Second, neither the words – 'To an affidavit by one deponent ...' (see Form 78(a)) nor the words 'To an affidavit by a blind (illiterate) person ...' (see Form 78(c)), as the case may, are found in the jurat. There words are of significance because they not only certify the circumstances of the deponent in the making of the affidavit but they also indicate which particular form in Form 78 (eg, whether Form 78(a) or Form 78(c)) is being used. If the deponent is neither blind nor illiterate but is not conversant in the Malay language (bearing in mind in the present case that the affidavit is in the Malay language), then Form 78(a) must be used. The affidavit must be interpreted to him in the language that he understands by a competent interpreter, and thereafter that part of the form which reads 'Through the interpretation of ...)' must be completed accordingly. The full name of the interpreter (together with his identity card number) that

a and the language (for example, Mandarin or Cantonese) used by him to interpret the contents of the affidavit to the deponent must be recorded in the blank spaces provided in the brackets.

If, on the other hand, the deponent is conversant in the Malay language (and is not blind of illiterate), the form that must be used is still Form 78(a) and b the aforesaid part of the form may still be completed. But it must now be completed by inserting in the blank spaces within the brackets the words (interpretation not required) 'in the following manner:

(Through the interpretation of (interpretation not required)).

c I agree that a jurat is a certificate by itself and thus needs to be entitled as in the action. To my mind, the title of the action must form part of the jurat as provided in Form 78. The words "Title as in action" appearing at the top part of the Form is not merely for decorative purposes. It is meant to be included in the jurat as a form of a certificate. The only place in O. 41 which d makes reference to Form 78 is under r. 1(8). So, the whole Form 78 must specifically refer to r. 1(8) only. Thus, to my mind, the "title as in action" stated at the top of Form 78 must refer and be part of the jurat.

As regards the words "through the interpretation of", in the Form 78(a), I also agree with Hishamudin J (in the same case mentioned above) that eventhough e the deponent is conversant in Bahasa Malaysia (as claimed by the plaintiff's counsel) and is not blind or illiterate, the form that must be used is still Form 78(a) and that part of the form which reads "(Through the interpretation of ...)" must be completed accordingly ie, by inserting in the blank spaces within the brackets the words ('interpretation not required') in the following manner:

f Through the interpretation of (interpretation not required).

To leave it blank means the jurat is not properly completed and thus not complying with O. 41 r. 1(7) and (8) RHC. It is true that an affidavit in Bahasa Malaysia need not be interpreted to the deponent, if the deponent is g conversant in Bahasa Malaysia. But it must be some element of proof either in the affidavit itself or in the jurat to show that interpretation is not required. Only then, the court can safely assume that the deponent is conversant in Bahasa Malaysia.

In our present case, it is clear that the first affidavit dated 7 August 2000 h sworn by Stephanie Chiam Siew Peng has no 'title as in action' in its jurat and the words "through the interpretation of ..." had not been completed as suggested above. Thus the said affidavit failed to comply with O. 41 r. 1(7) and (8). The second affidavit dated 27 September 2000 sworn by the same deponent, eventhough has the 'title as in action' at the top of its jurat, still i failed to comply with the requirement as to "through the interpretation of ..." as stated above.

I have also observed that in both the affidavits, the words used were "Diikrarkan oleh Stephanie Chiam Siew Peng, di Kuala Lumpur pada ... 2000". I feel that these words had deviated from the actual words used in Form 78(a) which states:

> Berkenaan dengan affidavit oleh deponen bernama ... diikrarkan pada haribulan ... 2000 di ...

As such, the plaintiff had also failed to comply with those requirements.

There's another issue which had not been raised by both the counsels for the plaintiff and the defendant before the SAR as well as before me, which I find to be relevant for consideration in this matter. The issue relates to O. 41 r. 9(2) RHC which requires that "every affidavit **must** be indorsed with a note showing on whose behalf it is filed, and the dates of swearing and filing, and an affidavit which is not so indorsed may not be filed or used without the leave of the court". Again, the use of the word "must" in this rule indicates that the requirement is mandatory.

In our present case, both the affidavits in question do not contain any endorsement relating to "the dates of swearing and filing" of the affidavits. The endorsement at the end of both the affidavits is incomplete. It only mentioned about "on whose behalf it is filed" and the address of the solicitors for the plaintiff. This is another substantial deviation from the requirement of the rules and thus the plaintiff again had failed to comply with another requirement ie, O. 41 r. 9(2) RHC. There is no indication at all to show that the plaintiff had applied for leave of the court to use the said affidavits pursuant to the said r. 9(2). With all these non-compliances as stated above, I am satisfied that both the affidavits are defective and cannot be accepted for the purpose of the plaintiff's application for summary judgment.

Now, I would also like to refer to O. 1 r. 7 RHC which provides:

> The Forms in Appendix A **shall** be used where applicable with such variations as the circumstances of the particular case require.

Again, the word 'shall' as used in this rule indicates the mandatory nature of the requirement. The variations can only be accepted as the circumstance of the particular case require. In our present case, there is no evidence or proof to show that the circumstances of the case require the plaintiff to vary Form 78 in both the affidavits. There's no justification why the plaintiffs affidavits cannot comply with O. 41 r. 1(7) and (8) RHC. Strict compliance with the prescribed format is mandatory. As such both the affidavits are defective and cannot be accepted.

The above findings are also in line with a circular dated 22 May 1999 issued by the Chief Registrar of the Federal Court on behalf of the Chief Justices of the Federal Court, President of the Court of Appeal and Chief Judge of the High Court of Malaya, which *inter alia* says as follows:

> 2. Adalah dimaklumkan bahawa masih terdapat dokumen-dokumen mengenai kes-kes yang difailkan di Mahkamah yang tidak mematuhi sepenuhnya Aturan-Aturan dan Kaedah-Kaedah Mahkamah yang telah disediakan terutama mengenai Afidavit, Kertas dan Percetakan Dokumen. Mesyuarat YAA Ketua Hakim Negara Malaysia, YAA Presiden Mahkamah Rayuan dan YAA Hakim Besar Malaya pada 19 Mei 1999 telah mengambil maklum dan memandang berat tentang perkara ini dan seterusnya memutuskan mana-mana dokumen yang hendak difailkan di Mahkamah hendaklah ditolak di peringkat kaunter pendaftaran sekiranya kaedah-kaedah mengenainya tidak dipatuhi dengan tegas sepenuhnya.
>
> 3. Affidavit yang difailkan di Mahkamah hendaklah mematuhi sepenuhnya Kaedah-Kaedah yang sedia ada iaitu Aturan 41 Kaedah-Kaedah Mahkamah Tinggi 1980 atau Aturan 25 Kaedah-Kaedah Mahkamah Rendah 1980.

The content of the said circular was also published in the *Bar Council Infoline*, May-June 1999 issue. Eventhough the circular by itself is not a law, but it clearly, emphasised the relevant provisions of the law (ie, O. 41 RHC and O. 25 SCR) and strict compliance thereof. At least that was the message given to the judiciary as well as members of the Malaysian Bar.

The plaintiff's counsel also submitted that the defects in jurat in both the affidavits are not serious and the plaintiff is entitled to rely on O. 41 r. 4 RHC despite the irregularity. The counsel also submitted that an oral application to allow the use of defective affidavits under the said order should be sufficient in view of the fact that there was no opportunity or insufficient time for the plaintiff to make a proper formal application to invoke the said O. 41 r. 4 RHC because of a very short notice at which the defendant's notice of preliminary objection was given. The plaintiff contended that the defendant had only given his notice about the preliminary objection on 27 September 2000 (less than 24 hours before the hearing of the plaintiff's application for summary judgment). The defendant's counsel objected to this oral application and submitted that, in any case, there should have been a formal application for that purpose.

I shall deal with the complaint by the plaintiff about the defendant's notice of preliminary objection first. The plaintiff complained that the notice relating the preliminary objection by the defendant was given only a day before the hearing date fixed for the application for summary judgment before the SAR. As such the plaintiff claimed it has insufficient time to make a formal application under O. 41 r. 4 RHC.

In *Datuk Bandar Kuala Lumpur v. Seman bin Amat & 2 Other Cases* [1996] 3 CLJ 263, Abdul Kadir Sulaiman J, held that it is a good practice for a party intending to raise a preliminary objection to do so by giving prior notice. He went on to say that, however, it is not the law that the absence of prior notice will totally shut the door for the intended objector from raising the objection. The principle behind the need for prior notice is merely to avoid surprise. The same observations were made in *Jasabena Sdn. Bhd. v. Beh Heng Poo & Anor* [1985] 1 MLJ 394 and *Gurbachan Singh v. Seagrott & Campbell (No. 2)* [1962] 28 MLJ 370. The above ruling by Abdul Kadir bin Sulaiman J was followed by Nik Hashim JC (as he was then) in *Ooi Chew Seng v. Utratech Sdn Bhd* [1997] 5 CLJ 421 and *Dr. Woo Kin Chong v. Mary Ou Holdings Sdn Bhd* [1997] 5 CLJ 164. In *Jasabena*'s case *(supra)* eventhough no prior notice was given, the court heard the preliminary objection of the respondent, but for lack of merit, the court dismissed the objection raised. In *Ooi Chew Seng*'s case *(supra)* the court held that the prior notice of the preliminary objection was "good and the procedural requirement of giving the other side notice at the earliest possible moment had been satisfied" eventhough the said notice was only given by fax to the other side, a day before the hearing date.

A prior notice of preliminary objection can also be given by way of an affidavit sworn and filed by a deponent on behalf of the objector. In *Dr Woo Kin Chong v. Mary Ou Holdings Sdn Bhd* [1997] 5 CLJ 164 *(supra)*, the court held that such a notice, by way of an affidavit, is a sufficient prior notice for the purpose of preliminary objection.

In our case, an advanced notice of the intended preliminary objection was given in the affidavit of the defendant dated 18 September 2000 (encl. 5) at para. 4, in which it says that the said affidavit is defective and ought to be ignored by reason of non-compliance with the Rules of the High Court 1980 for which the defendant gave notice to raise a preliminary objection thereto.

Again on 27 September 2000 (one day before the plaintiff's application for summary judgment was fixed for hearing on 28 September 2000), the defendant had issued another letter (encl. 9) giving a more specific notice to the plaintiff of his intention to raise preliminary objection against both the affidavits for non-compliance with O. 41 r. 1(7) and (8) RHC. The preliminary objection was heard by the learned SAR on 28 September 2000 and later adjourned for decision on 6 October 2000. On 28 September 2000 the learned SAR had indicated to both the counsels that parties are at liberty to forward new/additional submissions and new authorities to him before 6 October 2000. The learned SAR finally gave his decision on 6 October 2000 when there was no new/additional submissions or authorities for either party. Under such circumstances, I could not understand why the plaintiff said that there was no opportunity and insufficient time for it to file a formal application for leave under O. 41 r. 4 RHC. If the first notice in the affidavit of the defendant

(encl. 5) is too general, then the second notice dated 27 September 2000 (encl. 9) is very clear and specific. Eventhough the time is short for the hearing on 28 September 2000, the plaintiff was given until 6 October 2000 to make new submission. During this period (between 28 September 2000 to 6 October 2000) the plaintiff could have done something to file a formal application for leave or to indicate to the learned SAR that it intended to do so before 6 October 2000. There was sufficient time then. But, the plaintiff chose not to do anything until 6 October 2000 when the learned SAR gave his decision. I agree with the defendant's counsel that if the plaintiff is serious about invoking O. 41 r. 4 RHC, there should have been a proper formal application made at the earliest opportunity. I believe that the plaintiff's failure to make a formal application for leave under O. 41 r. 4 RHC is not because of no opportunity or insufficient time but because of the plaintiff's own stand all these while that they have complied with O. 41 r. 1(7) and (8) RHC, hence no question of making any application for leave, oral or otherwise, would arise.

The plaintiff also relies on the Rulings of the Bar Council 1997, Part H at s. 19 on "Notice of Preliminary Objections" which says that an advocate and solicitor shall give written notice whether by letter, facsimile message or otherwise to all the other parties in the litigation, of his intention to raise a preliminary objection during the hearing. Such notice must be given not later than 48 hours before the hearing, failing which, the other parties have an automatic right to seek adjournment of the preliminary objection and the counsel raising the preliminary objection is precluded from objecting if such a request for an adjournment is made. The rulings also provide that nothing therein shall affect the general discretion of the court. I am of the view that the above Rulings of the Bar Council 1997 do not help the plaintiff in it's contention on the grounds that:

i) the said rulings do not affect the discretion of the court which is exercised based on the existing provisions of laws and relevant rules;

ii) the notice of preliminary objection given through the affidavit of the defendant dated 18 September 2000 (encl. 5) – ie, 10 days before the hearing was held to be a good and sufficient notice by the court based on decided cases;

iii) if at all the notice given by the defendant does not give the plaintiff an opportunity to prepare themselves and to secure instructions from their clients with regards to the proposed preliminary objection, the plaintiff should have applied for an adjournment for the preliminary objection as provided under s. 19(c) of the said rulings. (But in our case the plaintiff had not done so).

The plaintiff had stressed that they are entitled to rely on O. 41 r. 4 despite the irregularity. Order 41 Rule RHC, provides that:

> An affidavit may with the leave of the court be filed or used in evidence notwithstanding any irregularity in the form thereof.

I think the plaintiff misconstrues O. 41 r. 4 as giving them a carte blanche cover to overlook all forms of irregularities, without appreciating that O. 41 r. 4 gives the discretion to the court to allow or disallow a party to use a defective affidavit. Hence, the plaintiff's entitlement is subject to the court's discretion and unless it can be said the discretion was wrongly exercised the decision of the learned SAR should not be disturbed.

I shall now deal with the plaintiff's contention that the defect in the jurat, if any at most, is only an irregularity which can be cured under O. 2 r. 1 RHC. Again, the power of the court under O. 2 r. 1 RHC is discretionary. It's up to the court to exercise or to refuse to exercise it's discretion, depending on the circumstances of each case.

I must stress here that Rules of the High Court are made to streamline the administration of justice especially on procedures in litigations. It is a general rule that all the rules and forms thereunder must be complied with for the purpose of uniformity and certainty. The powers under O. 2 r. 1 and O. 41 r. 4 RHC are actual "exception to the rule". There must be strong justification why litigants cannot comply with those general rules, in order for the court to exercise such powers. The power should only be exercised sparingly. It should not be used to give litigants a carte blanche cover to overlook all forms or irregularities. A mere omission or oversight on part of litigants or counsel should not be an excuse to invoke those powers. Otherwise the "exception" will become the "rule" and the purpose of drafting all those rules would be defeated. In support of the above view, I would like to cite the passage by Mokhtar Sidin JCA in the case of *Capital Insurance Bhd v. Kasim Mohd. Ali* [2000] 1 CLJ 269 in which he said:

> In our view the Rules and Practice Directions made by this court are to be obeyed and not to be broken. We would like to stress here that parties to an appeal must adhere and comply strictly to those Rules and Directions. Of late we found that there were numerous instances where parties had not adhered or complied to those Rules and Directions and we want to make it clear that they do so at their own risk.

In *Yu Oi Young & Anor v. Ho Toong Peng & Ors.* [1977] 1 MLJ 120, it was held by the court that the rules and prescribed forms thereunder are primarily to be followed unless the departure justifies it. In that case, Chang Min Tat J, had ruled that:

> There should, in my view, be some adherence to the rules of court, unless required by circumstance, if there is to be any meaning or purpose in such rules. It should, I think, be realised by practitioners as well as by judges that while strict and slavish adherence to forms and rules can sometimes hinder the administrations of justice, these forms and rules should not be disregarded for no reason whatsoever, since they embody the experience of the courts over the years in the cause of speedy and efficient administration of justice.

The above case was cited with approval by the Federal Court in *TR Hamzah & Yeong Sdn. Bhd. v. Lazar Sdn. Bhd* [1985] 2 MLJ 45. In *Gan Hay Chong v. Siow Kian Yuh & Anor* [1975] 1 MLJ 41, Ajaib Singh J had ruled that the mistake or oversight by the solicitor for the appellant did not constitute a valid or sufficient ground on which the court could exercise it's discretion in favour of the appellant. He went on to say that:

> The rules are there to be followed and they may be relaxed in the interest of justice only if sufficient cause is shown. The procedural handmaid cannot, without good reason, come to the rescue of slow-moving litigants or their legal advises.

In another case, *Ratnam v. Cumarasamy & Anor* [1965] 31 MLJ 228, the appellant appealed to the Privy Council, against the decision of the Court of Appeal dismissing an applications for an extension of time for filing the record of appeal. The application for an extension of time was made because the appellant had failed to comply with O. 58 r. 15 of the Rules of the Supreme Court (at that time) which requires that the notice of appeal had to be filed within one month. The Privy Council held that:

> The Rules of Court must *prima facie* be obeyed, and in order to justify a court in extending the time during which some step in procedure requires to be taken there must be some material upon which the court can exercise it's discretion. If the law is otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a time table for the conduct of litigation.

(Eventhough the above case dealt with an application for an extension of time, the main issue involved is that the appellant had failed to comply with the Rules of the Supreme Court and the ruling should be applicable for the purpose of our present case).

The need to strictly adhere to the forms and rules especially in the RHC has been stressed by the court from time to time. Litigants and counsels should, by now, get the necessary message from those decided cases. In this context, I fully agree with Abdul Malik lshak J, in *Dato' Wong Gek Meng v. Pathmanathan a/l Mylvaganam* [1998] 1 CLJ 625 when he said:

> In my judgment, strict and dutiful adherence to forms and rules especially to the RHC will, in the long run, ensure an efficient bar and with it, hopefully, a speedy and efficient administration of justice. Objections to technicalities must be viewed *prima facie* as non-compliance with the rules and the defaulters must pay dearly for it. It is obsolete now to adopt the old-fashioned attitude that the rules of the RHC are intended to facilitate and not impede the administration of justice. On the contrary, the administration of justice would be curtailed if the rules embodied in the RHC are not religiously followed. With the advent of the Multimedia Super Corridor, lawyers cannot afford to adopt a lackadaisical attitude nor can they wring their hands and say that the courts would show mercy to them. As a code of procedure, the RHC should be strictly followed to the letter.

In our present case, the deviation from the prescribed format is not trivial in nature. The defect is serious and therefore the affidavits cannot be accepted, for failing to comply with O. 41 r. 1(7) and (8) RHC. In *Dynacast (S) Pte. Ltd. v. Lim Meng Siang & Ors.* [1989] 2 CLJ 1116, the High Court in Singapore had held that an affidavit that does not comply with the requirement of O. 41 is a defect of fundamental nature which cannot be cured. In *Kuah Kok Kim v. Chong Lee Leong Seng Co (Pte) Ltd.* [1991] 1 SLR 122, the Singapore Court of Appeal applied a strict approach when it said:

> Notwithstanding the very wide power given to the court to remedy non-compliance with the rules ... there may be failure or non-compliance with the rules which is so fundamental or serious that the court ought not to exercise its discretion under r. 1 to remedy it.

In the course of her argument before me, the plaintiff's counsel referred to the cases of *Bathamani a/p Suppiah v. Southern Finance Co. Bhd*. [2000] 2 CLJ 650 and *Re: Liow Fong Moi Ex. p Malayan Banking Bhd* [2000] 6 CLJ 63 to support her contention that the defect's in the affidavits only went to the form and not to the substance and thus the defects may be disregarded and the affidavits were allowed to be used. To my mind the decision of the above cases could not be relied upon by the plaintiff. Both the above cases referred to are bankruptcy cases which s. 131 of the Bankruptcy Act 1967 provides that no proceeding in bankruptcy shall be invalidated by any formal defect or by any irregularity, unless the court before which an objection is made to the proceeding is of opinion that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by any order of that court.

The plaintiff had also contended that the said affidavits ought to be accepted despite the irregularity because the defendant was not prejudiced by it. I am of the opinion that the seriousness of the irregularity is a more important ground to consider rather than it's prejudicial effect on the other party. Thus,

an affidavit may not be accepted if the irregularity is so serious despite the fact that it may not prejudice the other side. In *Leal v. Dunlop Bio-Process International Ltd.* [1984] 1 WLR 874, Stephenson LJ had said that:

> the seriousness of the irregularity was the basis for not exercising the discretion to cure notwithstanding the fact that the real prejudice may not be ... counsel at all.

On those authorities, I find that the defects in both the affidavits are so serious and thus could not be cured under O. 2 r. 1 RHC.

Decision Of The Court

Based on the above grounds and authorities cited, I am satisfied that the learned SAR was right in law in exercising his discretion to disallow the plaintiff to use the said affidavits which he found to be defective for want of compliance with O. 41 r. 1(7) and (8) RHC. As such the plaintiff's appeal is dismissed with cost and the learned SAR's decision on 6 October 2000 is confirmed.